A

BERJAYA TIMES SQUARE SDN BHD

v.

M-CONCEPT SDN BHD

B

FEDERAL COURT, PUTRAJAYA
ZULKEFLI MAKINUDIN FCJ
GOPAL SRI RAM FCJ
MOHD GHAZALI YUSOFF FCJ
[CIVIL APPEAL NO: 02(f)-22-2009(W)]

C

30 OCTOBER 2009

CONTRACT: *Breach - Building contract - Agreement for sale of shop-lot in building - Vendor unable to deliver vacant possession by specified time - Whether purchaser entitled to rescind agreement, recover moneys*

D

paid and claim damages - Whether claim for liquidated damages for late delivery disentitled purchaser from rescinding agreement - No provision on rescission in agreement, whether consequential - Purchaser continuing to make instalment payments, whether a waiver of right to rescission - Contracts Act 1950, s. 56(1)

E

CONTRACT: *Breach - Consequences, of - Option of innocent party whether to accept repudiation - Right of innocent party to terminate contract where breach goes to root of contract - Contract cannot be terminated where there is part performance by defaulting party - Breach*

F

of contract does not render it voidable - Termination of contract only ends future obligations - Past rights and duties remain unaffected - Equitable remedy of rescission not available where contract is breached - Common law right of rescission only in cases of total failure of consideration - Contracts Act 1950, s. 40

G

CONTRACT: *Rescission - Building contract - Agreement for sale of shop-lot in building - Vendor unable to deliver vacant possession by specified time - Whether time of essence of agreement - Whether purchaser entitled to rescind agreement, recover moneys paid and claim damages - Whether claim for liquidated damages for late delivery disentitled purchaser*

H

from rescinding agreement - No provision on rescission in agreement, whether consequential - Purchaser continuing to make instalment payments, whether a waiver of right to rescission - Whether purchaser stopped from rescinding agreement - Contracts Act 1950, s. 56(1)

I

The respondent entered into an agreement dated 24 August 1995 with the appellant to purchase a shop lot in the project developed by the appellant. The appellant was to deliver the respondent's lot to it on or before 23 November 1998, failing which it had to pay

liquidated damages. The appellant did not make delivery within the stipulated time. However, despite writing to the appellant on 27 December 2001 to terminate the agreement, the respondent continued to negotiate with the appellant. The respondent agreed to an extended completion date at the end of 2001 and later to another extended completion date at the end of 2002. Nevertheless, the appellant still failed to complete the project. In early March 2003, the respondent demanded the return of all sums paid to the appellant. The appellant claimed that all it was liable to pay were the liquidated damages. The respondent then commenced proceedings claiming, *inter alia*, a declaration that the agreement had been rescinded, for refund of the monies paid to the appellant and for damages. Despite the appellant's failure to deliver the respondent's shop lot, the latter continued to pay the instalments demanded by the appellant. The High Court and the Court of Appeal found for the respondent. The question for the consideration of the Federal Court was whether s. 56(1) of the Contracts Act 1950 ("the Act") applied here.

Held (allowing the appeal)
Per Zulkefli Makinudin FCJ:

(1) There was no question of the appellant not having done anything on the construction of the property as undertaken by them *vide* the agreement. The construction of the property was completed and was in the state of delivery to the respondent. The entitlement of the respondent was therefore confined to compensation in the form of LAD as agreed upon in the agreement and that the respondent had no right to rescind the agreement. (para 4)

(2) The appellant and the respondent had not intended that time should be of the essence of the contract for purposes of s. 56(1) of the Act. This was evidenced by the conduct of the respondent itself in having negotiations with the appellant to expedite the completion of the property before intimating its decision to rescind the agreement. The respondent took such a long period of time after the stipulated period and the extended period of completion to rescind the agreement. (para 5)

Per Gopal Sri Ram FCJ (Mohd Ghazali Yusoff FCJ concurring):

(1) The doctrine of repudiation is based on the proposition that where a promisor wrongfully repudiates a contract in its entirety, the promisee has a choice. He or she may elect to accept the repudiation, treat the contract as at an end and sue for damages. Alternatively, he or she may elect to reject the repudiation and treat the contract as subsisting. It is the essence of the doctrine of repudiation that the breach must go to the root of the contract. (para 13)

(2) The breach of a contract does not render it voidable. The right to terminate puts an end to the contract only as to the future. All past rights and duties under the contract remain unaffected. The equitable remedy of rescission is only available to set aside contracts that are voidable by reason of the ingredient of free consent. Equity does not restore the parties to a broken contract to their *status quo ante*. At common law, a right to rescind a contract arises only where there has been a total failure of consideration. The test is whether the party in default has failed to perform his promise in its entirety. (paras 14, 15, 16, 17 & 18)

(3) Under s. 40 of the Act, the right in a non-defaulter to repudiate a contract only accrues when the defaulter has refused to perform or has disabled himself or herself from performing the whole of his promise. If there is part performance by the defaulting party, the innocent party may not put an end to the contract. (para 24)

(4) Section 56(1) should be read together with s. 40 of the Act when determining whether a promisor has committed a breach of such a nature that goes to the root of the contract. (para 27)

(5) The appellant did construct the tower block in which the respondent's unit was located. But it did not complete the construction within the specified time. There was a delay in the delivery of vacant possession and for that breach the contract itself provided a remedy - the payment of liquidated damages. This was not a case where there had been a total failure of consideration. (paras 33 & 35)

(6) Time was not of the essence of the agreement here. A promise to construct and deliver a building within a stipulated time coupled with a promise to compensate for any delay in delivery is inconsistent with a right to terminate on the ground that time is of essence. It pointed to an intention that time was not to be of essence. (para 44)

(7) The respondent continued making payments and negotiating for delivery. The respondent's conduct pointed to the conclusion that even if time was of the essence when the contract was made it ceased to be of the essence. (para 45)

(8) On a proper construction of the agreement, time was not of the essence. The respondent was not entitled to terminate the contract. All that it was entitled to receive was compensation calculated on the agreed basis. Its purported termination of the agreement was therefore wrongful. (para 46)

Bahasa Malaysia *Translation Of Headnotes*

Responden telah memeterai suatu perjanjian bertarikh 24 Ogos 1995 dengan perayu bagi tujuan membeli satu shop lot dalam projek yang dibangunkan oleh perayu. Perayu dikehendaki menyerah shop lot tersebut kepada responden pada atau sebelum 23 November 1998, dan sekiranya gagal perayu dikenakan bayaran gantirugi jumlah tertentu. Perayu gagal membuat penyerahan dalam masa tempoh yang diberi. Meskipun responden telah menulis surat kepada perayu untuk menamatkan perjanjian, responden masih terus berunding dengan perayu. Responden telah bersetuju dengan lanjutan tarikh penyelesaian pada akhir tahun 2001 dan seterusnya dengan lagi satu lanjutan tarikh penyelesaian pada akhir tahun 2002. Namun perayu masih gagal untuk menyiapkan projek. Pada awal bulan Mac 2003, responden telah menuntut balik semua bayaran yang telah dibuat kepada perayu. Perayu pula berhujah bahawa ia hanya bertanggungan untuk membayar gantirugi jumlah tertentu. Responden memulakan prosiding menuntut *inter alia* satu deklarasi bahawa perjanjian tersebut telah dibatalkan, untuk bayaran balik dan untuk ganti rugi. Meskipun perayu telah gagal menyerah shop lot kepada responden, responden masih membuat bayaran ansuran kepada perayu. Mahkamah Tinggi dan Mahkamah Rayuan telah membuat keputusan untuk responden. Isu yang timbul di hadapan Mahkamah Persekutuan adalah sama ada s. 56(1) Akta Kontrak 1950 ('Akta Kontrak') digunapakai dalam kes ini.

Diputuskan (membenarkan rayuan)
Oleh Zulkefli Makinudin HMP:

(1) Tiada persoalan bahawa perayu gagal membina hartanah tersebut seperti yang dipersetujui di bawah perjanjian tersebut. Pembinaan hartanah itu telah diselesaikan dan dalam keadaan yang sedia diserah kepada responden. Oleh itu, hak responden adalah terhad kepada pampasan dalam bentuk LAD seperti dipersetujui dalam perjanjian. Responden tiada hak untuk membatalkan perjanjian tersebut.

(2) Perayu dan responden tidak bermaksud untuk membuat masa sebagai intipati perjanjian tersebut untuk tujuan s. 56 Akta. Ini dibuktikan oleh perlakuan responden sendiri yang berunding dengan perayu untuk mempercepatkan penyelesaian binaan hartanah tersebut sebelum membayangkan keputusannya untuk membatalkan perjanjian. Responden telah mengambil terlalu banyak masa selepas tempoh yang ditetapkan dan masa yang dilanjutkan untuk penyelesaian binaan hartanah tersebut untk membatalkan perjanjian.

Oleh Gopal Sri Ram HMP (Mohd Ghazali Yusoff HMP menyetujui):

(1) Doktrin penolakan adalah berdasarkan pengataan bahawa apabila penjanji dengan salahnya menolak keseluruhan kontrak, penerima janji mempunyai pilihan. Penerima janji boleh menerima penolakan, menanggapkan kontrak sudah berakhir dan menuntut ganti rugi. Secara alternatif, penerima janji boleh menolak penolakan dan menganggap kontrak sebagai masih berkuatkuasa. Ia adalah intipati doktrin penolakan bahawa kemungkiran hendaklah menyentuhi akar umbi kontrak.

(2) Kemungkiran kontrak tidak menyebabkan ia boleh batal. Hak pembatalan menamatkan kontrak hanya berdasarkan masa hadapan. Segala hak dan tanggungjawab terdahulu kekal. Remedi ekuiti pembatalan hanya digunakan untuk mengenepikan perjanjian yang boleh batal disebabkan oleh ciri kerelaan bebas. Ekuiti tidak mengembalikan pihak-pihak di dalam perjanjian yang telah dibatalkan ke posisi asal mereka. Dalam common law, hak untuk membatalkan perjanjian timbul hanya apabila terdapatnya kegagalan balasan. Ujiannya adalah sama ada pihak yang ingkar telah gagal menepati keseluruhan janjinya.

(3) Di bawah s. 40 Akta Kontrak, hak pihak yang tidak ingkar untuk menolak perjanjian hanya berbangkit apabila pihak yang ingkar tidak melaksanakan atau telah gagal melaksanakan keseluruhan janjinya. Jikalau pihak yang ingkar telah melaksanakan sebahagian dari obligasinya, pihak yang tidak bersalah tidak harus menamatkan perjanjian.

(4) Seksyen 56(1) patut dibaca dengan s. 40 Akta Kontrak apabila memastikan sama ada penjanji telah melanggari perjanjian yang menyentuhi akar umbi kontrak.

(5) Perayu telah membina blok menara di mana unit responden bertapak. Tetapi ia gagal menyiapkan pembinaan dalam tempoh masa yang diberi. Terdapat kelewatan penyerahan milikan kosong dan untuk pelanggaran tersebut perjanjian telah menyediakan remedi - bayaran ganti rugi jumlah tertentu. Ini bukanlah kes di mana berlakunya kegagalan balasan.

(6) Di sini, masa bukanlah intipati perjanjian. Perjanjian untuk membina dan menyerah bangunan dalam tempoh masa yang diberi bersama-sama dengan perjanjian untuk mengganti rugi bagi kelewatan penyerahan adalah tidak konsisten dengan hak untuk membatalkan atas dasar masa adalah intipati perjanjian.

(7) Responden tetap membuat bayaran dan terus berunding untuk penyerahan. Kelakuan responden menunjukkan kesimpulan bahawa jika masa adalah intipati perjanjian apabila ia dibuat, ia tidak lagi merupakan intipati.

(8) Dalam memberi pentafsiran yang betul terhadap perjanjian tersebut, masa bukanlah intipati perjanjian. Responden tiada hak untuk membatalkan perjanjian. Responden hanya berhak untuk menerima pampasan yang dikira atas dasar yang telah dipersetujui. Pembatalan perjanjian yang telah dilaksanakan oleh responden adalah salah.

Case(s) referred to:

Attorney General of Belize v. Belize Telecom Limited [2009] UKPC 11 ***(refd)***

Bank of Credit and Commerce International SA v. Munawar Ali [2001] 2 WLR 735 ***(refd)***

Bowes v. Chaleyer [1923] 32 CLR 159 ***(refd)***

Car and Universal Finance v. Caldwell [1965] 1 QB 525 ***(refd)***

Chye Fook v. Teh Teng Seng Realty Sdn Bhd [1988] 1 LNS 213 HC ***(refd)***

Fibrosa Spolka Akcyjna v. Fairbairn Lawson Combe Barbour Ltd [1943] AC 32 ***(refd)***

A *Freeth v. Burr [1874] LR 9 CP 208* ***(refd)***
Great Peace Shipping Ltd v. Tsavliris Salvage (International) Ltd [2002] EWCA Civ 1407 ***(refd)***
Hind Construction Contractors v. State of Maharashtra AIR [1979] SC 720 ***(refd)***
B *Hongkong Fir Shipping Co Ltd v. Kawasaki Kisen Kaisha [1962] 2 QB 26* ***(refd)***
Investors Compensation Scheme Ltd v. West Bromwich Building Society [1998] 1 All ER 98 ***(refd)***
Jamshed v. Burjorji AIR [1915] PC 83 ***(refd)***
Johnson v. Agnew [1980] AC 367 ***(refd)***
C *Keng Huat Film Co Sdn Bhd v. Makhanlall (Properties) Pte Ltd [1983] 2 CLJ 187; [1983] CLJ (Rep) 186 FC* ***(refd)***
Law Ngei Ung v. Tamansuri Sdn Bhd [1989] 2 CLJ 181; [1989] 2 CLJ (Rep) 44 HC ***(refd)***
Linggi Plantations Ltd v. Jagatheesan [1971] 1 LNS 66 PC ***(refd)***
D *Loh Wai Lian v. SEA Housing Corporation Sdn Bhd [1987] 1 LNS 37 PC* ***(refd)***
Longstaff v. Birtles [2001] EWCA (Civ) 1219 ***(refd)***
Mannai Investment Co Ltd v. Eagle Star Life Assurance Co Ltd [1997] AC 749 ***(refd)***
Mayson v. Clouet & Anor [1924] AC 980 ***(refd)***
E *Moschi v. Lep Air Services Ltd [1973] AC 331* ***(refd)***
Muralidhar Chatterjee v. International Film Co Ltd AIR [1943] PC 34 ***(refd)***
Nouvau Mont Dor (M) Sdn Bhd v. Faber Development Sdn Bhd [1985] 1 CLJ 56; [1985] CLJ (Rep) 231 FC ***(refd)***
F *Philpot v. Evans [1839] 151 ER 200* ***(refd)***
Photo Production Ltd v. Securicor Transport Ltd [1980] 1 All ER 556 ***(refd)***
Prenn v. Simmonds [1971] 3 All ER 237 ***(refd)***
Rama Rao v. Bashu Khan Saheb [1998] 2 CTC 363 ***(refd)***
Rasiah Munusamy v. Lim Tan & Sons Sdn Bhd [1985] 1 CLJ 541; [1985] CLJ (Rep) 266 FC ***(refd)***
G *Ripley v. M'Clure [1849] 154 ER 1245* ***(refd)***
Sargent v. ASL Developments Ltd [1974] 131 CLR 634 ***(refd)***
Shree Hanuman Cotton Mills v. Tata Air Craft Ltd AIR [1970] SC 1986 ***(refd)***
Solle v. Butcher [1949] 2 All ER 1107 ***(refd)***
H *Tan Yang Loong & Anor v. Newacres Sdn Bhd [1992] 1 CLJ 211; [1992] 3 CLJ (Rep) 666 CA* ***(refd)***
VK Kumaraswami Chettiar v. PASV Karuppuswami Mooppanar AIR [1953] Mad 380 ***(refd)***
Wong Kup Sing v. Jeram Rubber Estates Ltd [1969] 1 LNS 201 HC ***(refd)***

I

Legislation referred to:
Contracts Act 1950, ss. 40, 56(1), 65, 66
Specific Relief Act 1950, ss. 34, 35, 36, 37

Contract Act 1872 [India], ss. 39, 55, 64, 65

Other source(s) referred to:
Goff & Jones, *The Law of Restitution*, 6th edn, p 502, para 20-007
Halsbury's Laws of England, vol 4, 4th edn, para 1179

For the appellant - B Thangaraj (Ranjan Chandran with him); M/s Thangaraj & Assoc
For the respondent - Lambert Rasa-Ratnam (Mong Chung Seng & Kokila Vaani Vadiveloo with him); M/s Lee Hishamuddin Allen & Glendhill

[Appeal from Court of Appeal; Civil Appeal No: W-02-546-2004]

[Editor's note: For the Court of Appeal judgment, please see Berjaya Times Square Sdn Bhd v. M-Concept Sdn Bhd [2010] 1 CLJ 309]

Reported by Amutha Suppayah

JUDGMENT

Zulkefli Makinudin FCJ:

[1] I have read the judgment in draft of my learned brother Gopal Sri Ram, FCJ and I agree with the views expressed and the conclusion reached by his lordship in allowing this appeal by the appellant. I would like to add in a few words in support of the judgment as follows:

[2] It is to be noted at the outset that the project undertaken by the appellant was never abandoned and at all material time the appellant had kept the respondent informed of the progress of the development. In my view the learned trial judge misdirected himself in holding that the failure of the appellant to deliver vacant possession of the property after 23 November 1998 amounted to fundamental breach of the agreement and therefore the agreement was voidable at the option of the respondent pursuant to s. 56(1) of the Contracts Act 1950 ("the Act") when on the contrary the respondent did not immediately after 23 November 1998 make an election to rescind the agreement and had in fact made an unequivocal election to make further progress payments and affirmed the agreement by paying the purchase price in full.

[3] Clauses 22(1) and 22(2) of the sale and purchase agreement ("SPA") are relevant in support of the appellant's case in which the observation on that clauses are as follows:

(i) there is the initial completion period of 36 months;

(ii) there is then the automatic extension period of three months for the completion from the initial 36 months period; and

(iii) there is the provision for liquidated ascertained damages (LAD) which is to follow the event of the appellant failing to hand over vacant possession of the property within the extended period for completion.

[4] As regards the law on rescission of contract which is the main issue to be decided in the present case, I am of the view on the factual matrix of the case s. 56(1) should be read together with s. 40 of the Act in determining the question as to whether the appellant as the party that was obliged to perform its promise had refused to perform it promise in its entirety by not doing any of the things it promised to do within the time specified by the contract. A reference to ss. 40 and 56(1) of the Act clearly showed that the right to rescind a contract by way of termination only arises when there has been a total failure of consideration. What is of significance on the facts of this case is that there is no question of the appellant not having done anything on the construction of the property as undertaken by them *vide* the SPA. Indeed the facts before the court showed that the construction of the property was completed and was in the state of delivery to the respondent. It is my view that the entitlement of the respondent in this case is confined and limited to compensation in the form of LAD as agreed upon in the SPA and that the respondent has no right to rescind the SPA.

[5] It is also my considered view that the appellant and the respondent had not intended that time should be of the essence of the contract for purposes of s. 56(1) of the Act. This is evidenced by the conduct of the respondent itself in having several negotiations with the appellant with a view to expediting the completion of the construction of the property before intimating to the appellant of its decision to rescind the SPA. The respondent also took such a long period of time after the

stipulated period and the extended period of completion to rescind the SPA. The fixing of a period within which the contract is to be performed as laid out in cl. 22(1) of the SPA therefore does not make the stipulation as to time to be the essence of the contract under cl. 32 of the SPA.

Gopal Sri Ram FCJ:

[6] The appellant is a property developer. It set out to develop a project originally called Berjaya Star City which is now known as Berjaya Times Square. The project is a massive venture. It has been completed. It comprises of various types of service outlets and offices. Parcels in the project were offered for sale to the public at large. The respondent is a private limited company. It wanted to purchase a commercial shop lot in the project. It entered into an agreement with the appellant to purchase such a lot. The agreement is dated 24 August 1995. Under its terms the appellant was to deliver the respondent's lot to it on or before 23 November 1998. If the appellant delayed in making delivery, it had to pay liquidated damages to be calculated from day to day at the rate of 12% per annum of the purchase price. The agreement also made time of the essence. The appellant did not make delivery within the stipulated time. Several meetings were held between the parties to determine when delivery could be made. The appellant told the respondent that it would make delivery by the end of 2001. But that did not happen. After a very brief exchange of correspondence, the parties had another meeting on 1 October 2002 at which the appellant assured the respondent that the shop lot would be delivered by the end of 2002. That again did not materialise. In early March 2003, there was yet another exchange of correspondence. The respondent demanded the return of all sums in the hands of the appellant and the latter claimed that all it was liable to pay were the liquidated damages worked out according to the agreed formula. The respondent then commenced proceedings claiming, *inter alia*, a declaration that the agreement had been rescinded and for an order that the appellant refund the monies in its hands. There was also a claim for damages.

[7] The High Court found for the respondent. Its findings have been usefully summarised as follows by learned counsel for the respondent in his skeletal arguments from which I propose to borrow:

(i) that the appellant's failure to deliver vacant possession of the subject property on the date of completion constituted a fundamental breach of the agreement that the respondent had with the appellant;

(ii) that time was of the essence of the contract and that the appellant's failure to deliver vacant possession on the stipulated time rendered the agreement voidable at the option of the respondent by virtue of s. 56(1) Contracts Act, 1950 so that the respondent was entitled to rescind the agreement;

(iii) that the respondent was not therefore confined to its remedy under the liquidated damages clause in the agreement.

[8] Based on its foregoing findings the High Court granted the following relief:

(i) a declaration that the agreement has been validly rescinded;

(ii) an order directing the appellant to refund the sum RM1,034,793 being 90% of the purchase price paid;

(iii) an order directing the appellant to indemnify the respondent in the sum of RM241,820.99 being the financing costs, legal fees and other expenses incurred by the respondent to purchase the subject property as at 27 December 2001 being the date of the respondent's first letter terminating the agreement;

(iv) an order directing the appellant to indemnify the respondent in respect of all financing costs, legal fees and other expenses incurred by the respondent to purchase the subject property, from 27 December 2001 until the date of the judgment;

(v) an order that the appellant pay to the respondent damages to be assessed by the registrar of the High Court.

An appeal to the Court of Appeal failed and the appellant, having obtained the leave of this court has appealed to us.

[9] At this point it may be convenient to mention a further fact. There is evidence to show that the even after the appellant's failure to deliver the respondent's shop lot unit to it, the latter continued to make payment of the instalments that were demanded of it by the former. There is also evidence on record to show that on 27 December 2001 the respondent wrote to the appellant terminating the agreement between them. Despite this, the

respondent continued to negotiate with the appellant as witnessed by the meeting they had on 1 October 2002 at which the appellant assured that vacant possession would be delivered by the end of 2002. The significance of these events will be discussed at the appropriate place in this judgment.

[10] Returning to the mainstream, the question reserved for our consideration is whether s. 56(1) of the Contracts Act 1950 ("the Act") applies here. That apart, there are much larger and far more important issues at stake in this appeal that go to the very basic fabric of the law of contract in this country. Before addressing these issues there is an important observation that needs to be made. It is this. The agreement in the present case is one that is not regulated by statute. In short, it is not a contract governed by the Housing Developers legislation. The appellant and respondent were therefore at complete liberty, in accordance with the doctrine of freedom of contract to agree on any terms they thought fit. The role of the court is to interpret the contract in a sensible fashion. See, *Loh Wai Lian v. SEA Housing Corporation Sdn Bhd* [1987] 1 LNS 37. As Lord Steyn said in *Mannai Investment Co Ltd v. Eagle Star Life Assurance Co Ltd* [1997] AC 749, 771:

> In determining the meaning of the language of a commercial contract, and unilateral contractual notices, the law therefore generally favours a commercially sensible construction. The reason for this approach is that a commercial construction is more likely to give effect to the intention of the parties. Words are therefore interpreted in the way in which a reasonable commercial person would construe them. And the standard of the reasonable commercial person is hostile to technical interpretations and undue emphasis on niceties of language. In contradistinction to this modern approach, Lord Greene M.R's judgment in *Hankey v. Clavering* [1942] 2 KB 326 is rigid and formalistic.

[11] At the heart of this appeal lies the question: what are the rights of an innocent party where there is a breach of contract? The question is one upon which there has been much discussion for about 150 years and the cases decided during that period of time have settled the applicable principles. See, *Philpot v. Evans* [1839] 151 ER 200, 202; *Ripley v. M'Clure* [1849] 154 ER 1245, 1251. Nevertheless, cases do arise from time to time that question these settled principles necessitating the courts to re-state them. This case presents us with such an opportunity.

[12] The starting point is to recognise that in an action for breach of contract it is the court that determines who is the innocent party and who is the guilty party. That problem does not arise in the present case because the appellant has freely admitted throughout the proceedings that it is the party that is guilty of having breached the contract. The only issue that remains is whether - as held by the learned trial judge - the respondent as the innocent party is entitled to rescind, the contract, that is to say, to have the parties restored to a position where they will stand as if the contract had never been made.

[13] The doctrine of repudiation is based on the proposition that where a promisor wrongfully repudiates a contract in its entirety, the promisee has a choice. He or she may elect to accept the repudiation, treat the contract as at an end and sue for damages. The rationale is that the primary obligation to perform the promise made is substituted with a secondary obligation to compensate the promisee for the breach. See, *Moschi v. Lep Air Services Ltd* [1973] AC 331. Alternatively, he or she may elect to reject the repudiation and treat the contract as subsisting. Whether the one or the other course was adopted by the promisee - the innocent party - is a fact that is to be inferred by the court from the objective facts, including the words and conduct of the parties. An election once made is irreversible. See, *Sargent v. ASL Developments Ltd* [1974] 131 CLR 634, 655. But it is the essence of the doctrine of repudiation that the breach must go to the root of the contract. See, *Mayson v. Clouet & Anor* [1924] AC 980; *Bowes v. Chaleyer* [1923] 32 CLR 159; *Hongkong Fir Shipping Co Ltd v. Kawasaki Kisen Kaisha* [1962] 2 QB 26. In the absence of an express refusal to perform, the test is whether the conduct of the contract-breaker is such that a reasonable person would say of it that he has breached his promise in its entirety. See, *Freeth v. Burr* [1874] LR 9 CP 208; *Rasiah Munusamy v. Lim Tan & Sons Sdn Bhd* [1985] 1 CLJ 541; [1985] CLJ (Rep) 266.

[14] There is another way of stating the proposition. If a promisor does not perform his promise in its entirety, the promisee may terminate the contract. This right of termination was referred to by the common law lawyers of the 19th Century as a right to rescind. So they wrongly described a broken contract as being voidable. This was incorrect as the breach of a contract does not render it voidable.

[15] Some writers continue to use the word rescind in this sense. Professor G.H Treitel is one. See, Trietel's *"Law of Contract"*, (11th edn). But this "rescission" is very different from the specific relief of rescission invented by the court of Chancery. The right to terminate puts an end to the contract only as to the future. All past rights and duties under the contract remain unaffected. But that is not the case where the equitable remedy of rescission is obtained by a decree from the court or by self-help. An example that illustrates rescission as a self-help remedy is *Car and Universal Finance v. Caldwell* [1965] 1 QB 525. The remedy of rescission has the effect of restoring the parties to the same position as though the contract was never made. In other words, there is restitutio in integrum. Where it is impossible to restore the *status quo* ante, the court may grant equitable compensation as happened in *Longstaff v. Birtles* [2001] EWCA (Civ) 1219, a case of breach of fiduciary duty.

[16] The hallmark of the equitable remedy of rescission is that it is only available to set aside contracts that are voidable by reason of the ingredient of free consent, which is the *sine qua non* in the making of a contract, having been vitiated by an element external to the contract. Examples of elements that vitiate free consent are fraud, misrepresentation, duress, undue influence and a breach of fiduciary duty. Whether a court of equity will set aside a contract that is void for common mistake (which is an element that does not vitiate free consent) is one that is debatable after the decision of the English Court of Appeal in *Great Peace Shipping Ltd v. Tsavliris Salvage (International) Ltd* [2002] EWCA Civ 1407; [2003] QB 679; [2002] 4 All ER 689 which sought to overrule Denning LJ's view in *Solle v. Butcher* [1949] 2 All ER 1107, [1950] 1 KB 671. Speaking for myself, I am not prepared to say, in the absence of full argument on the point, that Denning LJ was wrong in *Solle v. Butcher* and that the Court of Appeal in *Great Peace Shipping* is correct. Be that as it may, the position in equity is that rescission is not a remedy available for the breach of a contract. In short, equity does not restore the parties to a broken contract to their *status quo ante*.

[17] That said, it is now settled that there is, at common law, a right to rescind a contract in very limited circumstances. In essence it is the quasi-contractual remedy of restitution in cases where there has been a total failure of consideration. In *Fibrosa Spolka Akcyjna v. Fairbairn Lawson Combe Barbour Ltd* [1943] AC 32, 48, Viscount Simon LC said:

> ... in the law relating to the formation of contract, the promise to do a thing may often be the consideration, but when one is considering the law of failure of consideration and of the quasi-contractual right to recover money on that ground, it is, generally speaking, not the promise which is referred to as the consideration, but the performance of the promise. The money was paid to secure performance and, if performance fails the inducement which brought about the payment is not fulfilled.
>
> If this were not so, there could never be any recovery of money, for failure of consideration, by the payer of the money in return for a promise of future performance, yet there are endless examples which show that money can be recovered, as for a complete failure of consideration, in cases where the promise was given but could not be fulfilled ...

[18] What has to be added to the learned Lord Chancellor's view is the qualification:

> ... that failure of consideration does not depend upon the question whether the promisee has or has not received anything under the contract ... but rather whether the promisor has performed any part of the contractual duties in respect of which the payment is due." (*Stocznia Gdanska SA v. Latvian Shipping Co* [1998] 1 All ER 883, per Lord Goff of Chieveley)

In other words, when deciding whether there is in a given case total failure of consideration, the court must first interpret the promise as a whole and next view the performance of the promise from the point of view of the party in default. The test is not whether the innocent party received anything under the contract. The test is whether the party in default has failed to perform his promise in its entirety. The facts of *Stocznia Gdanska* illustrate the proposition.

[19] The plaintiffs were Polish shipbuilders. They entered into several agreements to design, build, complete and deliver ships for the second defendant, a wholly-owned subsidiary of the first defendant. Payment was to be made in instalments. The defendants defaulted and the plaintiffs held them in breach. They sued to recover damages for breach of contract. The defendants argued that that there was a total failure of consideration as they had received no vessel from the plaintiffs. The House of Lords held that the plaintiffs' promise when properly construed was not merely to deliver the ships but to also design them. This latter part of the promise the plaintiffs had performed. There was accordingly no total failure of consideration.

[20] Absent a total failure of consideration, the common law right to rescind does not exist. Goff & Jones *"The Law of Restitution"* (6th edn) which is the leading text on the subject has this to say at p. 502, para. 20-007:

> A breach of contract may be so fundamental that it deprives the 'party who has further undertakings still to perform of substantially the whole benefit which it was the intention of the parties as expressed in the contract that he should obtain as the consideration for performing those undertakings.' (*Hong Kong Fir Shipping Co Ltd v. Kawasaki Kaisen Kaisha Ltd* [1962] 2 QB 26]. The innocent party has then an election. He may affirm the contract or he may bring it to an end. In the latter event, if he has paid money to the defendant under the contract, he can, **as an alternative to claiming damages**, sue for recovery of the money **provided that the consideration for the payment has wholly failed; if the consideration has partially failed**, his only action is for damages. (Emphasis added)

In other words, where there has been a total failure of consideration, the innocent party has the alternative remedy of suing to recover monies paid under the contract to the guilty party. But he can under no circumstances have his money returned and claim damages. And if the consideration has only partially failed, he may only claim damages. What is important is that this limited common law right to rescind should never be equated with the equitable remedy of rescission earlier discussed. I may add for completeness that in this country the equitable remedy of rescission has received statutory force. See, ss. 34 to 37 of the Specific Relief Act 1950.

[21] There are two leading English cases that make the position clear. The first is *Johnson v. Agnew* [1980] AC 367, 392 where Lord Wilberforce said:

> At this point it is important to dissipate a fertile source of confusion and to make clear that although the vendor is sometimes referred to in the above situation as 'rescinding' the contract, this so-called 'rescission' is quite different from *rescission ab initio*, such as may arise for example in cases of mistake, fraud or lack of consent. In those cases, the contract is treated in law as never having come into existence. (Cases of a contractual right to rescind may fall under this principle but are not relevant to the present discussion.) In the case of an accepted repudiatory breach the contract has come into existence but has been put an end to or discharged. Whatever contrary indications may be

A disinterred from old authorities, it is now quite clear, under the general law of contract, that acceptance of a repudiatory breach does not bring about 'rescission *ab initio*'.

[22] The other is *Photo Production Ltd v. Securicor Transport Ltd* [1980] 1 All ER 556, where Lord Wilberforce repeated what he had said in *Johnson v. Agnew*:

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> ... when in the context of a breach of contract one speaks of 'termination' what is meant is no more than that the innocent party or, in some cases, both parties are excused from further performance. Damages, in such cases, are then claimed under the contract, so what reason in principle can there be for disregarding what the contract itself says about damages, whether it 'liquidates' them, or limits them, or excludes them? These difficulties arise in part from uncertain or inconsistent terminology. A vast number of expressions are used to describe situations where a breach has been committed by one party of such a character as to entitle the other party to refuse further performance; discharge, rescission, termination, the contract is at an end, or dead, or displaced; clauses cannot survive, or simply go. I have come to think that some of these difficulties can be avoided; in particular the use of 'rescission', even if distinguished from rescission *ab initio*, as an equivalent for discharge, ... may lead to confusion in others. To plead for complete uniformity may be to cry for the moon. But what can and ought to be avoided is to make use of these confusions in order to produce a concealed and unreasoned legal innovation ...

C D E F

[23] In the same case Lord Diplock said:

> When there has been a fundamental breach or breach of condition, the coming to an end of the primary obligations of both parties to the contract at the election of the party not in default is often referred to as the 'determination' or 'rescission' of the contract or, as in the Sale of Goods Act 1893, 'treating the contract as repudiated'. The first two of these expressions, however, are misleading unless it is borne in mind that for the unperformed primary obligations of the party in default there are substituted by operation of law what I have called the secondary obligations.

G H

[24] It is my considered judgment that the position is no different in Malaysia. Section 40 of the Act is a re-statement of the English common law position. It provides as follows:

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> When a party to a contract has refused to perform, or disabled himself from performing, his promise in its entirety, the promisee may put an end to the contract, unless he has signified, by words or conduct, his acquiescence in its continuance.

Special attention should be paid to the phrase "his promise in its entirety". Under the section the right in a non-defaulter to repudiate a contract only accrues when the defaulter has refused to perform or has disabled himself or herself from performing the whole of his promise. If there is part performance by the defaulting party, the innocent party may not put an end to the contract.

[25] That brings me to s. 56(1) of the Act which provides:

> When a party to a contract promises to do a certain thing at or before a specified time, or certain things at or before specified times, and fails to do any such thing at or before the specified time, the contract, or so much of it as has not been performed, becomes voidable at the option of the promisee, if the intention of the parties was that time should be of the essence of the contract.

[26] Learned counsel for the respondent submitted that since the subsection employs the phrase "voidable at the option of the promisee", it differs from the English common law. With respect that submission is without merit. In the first place, it was held by the Privy Council in *Jamshed v. Burjorji* AIR [1915] PC 83 that the section merely re-states the common law on the subject. In that case, Viscount Haldane after setting out s. 55 of the Indian statute said:

> Their Lordships do not think that this section lays down any principle which differs from those which obtain under the law of England as regards contracts to sell land. Under that law equity which governs the rights of the parties in cases of specific performance of contracts to sell real estate, looks not at the letter but, at the substance of the agreement in order to ascertain whether the parties, notwithstanding that named a specific time within which completion was to take place, really and in substance intended more than that it should take place within a reasonable time.

[27] In the second place, particular attention must be paid to the wording of the subsection. It says "fails to do any such thing" within the stipulated time. The words "any such thing" refer to the promise in its entirety. In my judgment, s. 56(1) should be read together with s. 40 of the Act when determining whether a promisor has committed a breach of such a nature that goes to the root of the contract. This is sometimes described as a fundamental breach. In the third place, s. 56(1) as is the case with the other provisions of the Act are *ipsissimis verbis* the corresponding provisions of the Indian Contract Act 1872. That

Act was drafted at a time in the history of the English common law when decided cases, spoke of the voidability of broken contracts and a right to rescind such contracts. This is what Lord Wilberforce in *Johnson v. Agnew* referred to as "the contrary indications" that "may be disinterred from old authorities". In my judgment, the phrase "becomes voidable at the option of the promisee" in s. 56(1) means this: a party not in default has a choice whether to put an end to the contract or signify his or her acquiescence in its continuance when the party in default commits a fundamental breach of contract by not performing his entire promise within the time stipulated by the contract, provided that time is of the essence of the contract.

[28] I now come to the authorities relied on by the respondent in support of its case. The first of these is *Muralidhar Chatterjee v. International Film Co Ltd AIR* [1943] PC 34. In that case, the plaintiff, a distributor of films in Calcutta entered into a contract with the defendants who imported films into India. By the terms of the contract, the plaintiff was to pay in advance for film prints that the defendants were to supply to him. The plaintiff paid the defendant Rs 2000 in advance and then proceeded to wrongfully repudiate the contract. The defendants elected to put an end to the contract and purported to forfeit the advance paid. The plaintiff sued to recover the sum paid under the contract relying on a joint reading of ss. 39, 64 and 65 of the Indian Contract Act which are in *pari materia* with ss. 40, 65 and 66 of the Act. The latter two sections read:

> 65. When a person at whose option a contract is voidable rescinds it, the other party thereto need not perform any promise therein contained in which he is promisor. The party rescinding a voidable contract shall, if he has received any benefit thereunder from another party to such contract, restore such benefit, so far as may be, to the person from whom it was received.
>
> 66. When an agreement is discovered to be void or when a contract becomes void, any person who has received any advantage under such agreement or contract is bound to restore it, or to make compensation for it, to the person from whom he received it.

Illustration (c) to s. 66 reads as follows:

> (c) A, a singer, contracts with B, the manager of a theatre, to sing at his theatre for two nights in every week during the next two months, and B engages to pay her a hundred

> rupees for each night's performance. On the sixth night, A wilfully absents herself from the theatre, and B, in consequence, rescinds the contract. B must pay A for the five nights on which she had sung.

The same illustration appears as illustration (a) to s. 39 of the Indian Act, that is to say, s. 40 of the Act. Acting on this similarity the Privy Council, whose judgment was delivered by Sir George Rankin said:

> Though the Indian Act is to be interpreted according to the meaning of the words used in it, such passages help to show that s. 39 and s. 64 cannot be read together as a matter of course if they do not appear by the mere force of their own language to link up. The question must therefore be whether there is elsewhere in the Act sufficient to show that the contract which may be 'put an end to' is 'voidable'? To this question their Lordships think the answer must be yes. The presence of illustration (c) to s. 65 cannot be made consistent with any other view. The effect of s. 39 is explained by the example there given of a singer who wilfully absents herself from the theatre. The same example serves also under s. 65 as illustration (c) and under s. 75. It is a prominent feature of this portion of the Act. The right of one party upon refusal by the other to perform the contract is described indifferently by the Act as a right to 'put an end to' or 'rescind' it; and illustration (c) plainly imports that this right is either that of 'a person at whose option the contract is voidable' (s. 64) or is such that by the exercise of it the contract 'becomes void' (s. 65). Of these two propositions it is to be observed that they are not mutually exclusive, whether or not each involves the other.

[29] In *Linggi Plantations Ltd v. Jagatheesan* [1971] 1 LNS 66, Lord Hailsham said that *Muralidhar Chatterjee*:

> is simply authority for the proposition that in section 65, where the words 'voidable' or 'rescind' are used, they can be applicable not merely to cases when a contract is brought to an end ab initio for fraud or undue influence or some similar cause, but also to cases where one party elects to terminate a contract repudiated by the other party through anticipatory breach or rejection of its fundamental terms.

[30] In *VK Kumaraswami Chettiar v. PASV Karuppuswami Mooppanar AIR* [1953] Mad 380 an unusually strong Bench of the Madras High Court comprising Rajamannar, CJ and Venkatarama Aiyar J explained the decision in *Muralidhar Chatterjee* as follows:

There the appellant had entered into a contract with the respondents for distributing films in various areas and had paid a sum of Rs. 4000 as advance. On 1-12-1933 the appellant wrote a letter complaining that the defendants had committed several breaches of the contract and that he would have no more business dealings with them. After some correspondence the respondents accepted the repudiation by letter dated 31-1-1937. Then the plaintiff filed an action for damages for breach of contract and also for the return of the advance. It was found that the defendants had not broken the contract and on that finding the claim for damages was dismissed. With reference to the claim for return of advance it was contended by the defendants that the plaintiff who was in default could not recover the same; while the plaintiff contended that as the contract had been rescinded by the respondents on 21-1-1937 he was entitled to its return under Section 64, Contract Act. The Privy Council accepted this contention and held that the plaintiff was entitled to recover the advance amount and that the right of the defendants was to make a cross claim for damages against the appellants for breach of contract. The decision as such has no bearing on the point now under discussion but it is argued that the case was dealt with as one falling under section 39, Contract Act; that the repudiation by the appellant contained in his letter dated 1-12-1936 was held to give a right to the respondents to avoid the contract and the letter dated 31-1-1937 was treated as an acceptance of the repudiation by them. In the same manner, contends Mr. N. Rajagopala Aiyangar, the failure of the respondent to take delivery of the goods on 2-8-1943 gave the appellants only a right to avoid the contract and they not having done that, the contract stood. But the agreement which the Privy Council had to consider in *Muralidhar Chatterjee v. International Film Ltd.*, was a continuing contract involving mutual obligations and is similar to the one which came before the House of Lords in *Heyman v. Darwins* [1942] AC 356. For the reasons already given, this decision cannot be taken as an authority for the contention that section 39 applies even when there is a refusal to perform the contract after the time for performance has arrived.

[31] In *Rama Rao v. Bashu Khan Saheb* [1998] 2 CTC 363, K Sampath J, after discussing the case of *Shree Hanuman Cotton Mills v. Tata Air Craft Ltd* AIR [1970] SC 1986 said this:

While dealing with that case, the Supreme Court referred to the decision in *Muralidhar Chatterjee v. International Film Co., Ltd.*, AIR [1943] PC 34 and held that **restoration of benefit under section 64 of the Contract Act (section 65 of the Act) would arise only when there was no breach on the part of the person**

> **seeking such restoration**. The situation here is also similar. In my view, the decision of the Supreme Court relied upon by the learned counsel for the appellants does not help the appellants at all. (Emphasis added.)

[32] In my view, the decision in *Muralidhar Chatterjee v. International Film Co Ltd* is readily explainable on the basis of the doctrine of restitution. There the plaintiff had paid moneys to the defendants but had received nothing in return. It would be an unjust enrichment to have permitted the defendants to keep the money when they had put an end to the contract. However, the defendants had a valid counterclaim for damages for breach of contract against the plaintiff. And they would, in recovering those damages, be obliged to give the plaintiff credit for the monies he had already paid. The true principle is this. A contract breaker must pay damages to the innocent party. However, if he has made any payment under the contract (not being a true deposit for the purchase of movable or immovable property) the contract breaker is entitled to have that payment set off against the damages he has to pay. However, he cannot seek to recover any benefit he may have conferred upon the innocent party where he is himself guilty of a breach of contract. Were it otherwise, a contract breaker will be in a position to take advantage of his own wrong. This is against principle and the policy of the law. In my judgment *Muralidhar Chatterjee v. International Film Co Ltd* does not decide any opposite principle. It does not therefore assist the instant respondent.

[33] The next authority relied on by the respondent is *Tan Yang Loong & Anor v. Newacres Sdn Bhd* [1992] 1 CLJ 211; [1992] 3 CLJ (Rep) 666. It is a judgment of Mahadev Shankar J (later JCA) whose views carry much weight. It was a case governed by the Housing Developers Act. There, several purchasers had entered into an agreement with the developer under which the latter was to construct and deliver a house with vacant possession within 36 months from the date of the agreement. The purchasers had made several payments to the developer. But the developer never constructed the house. In short, he failed or refused to perform his promise in its entirety within the time limited by the agreement. In fact the house had not even been constructed as at the date when the purchasers' action was tried. Hence, Shankar J had no difficulty in upholding the purchasers' claim for a declaration that they were no longer bound by the agreement and ordering a refund of the sums paid by them. That was a case

in which there was a total failure of consideration and hence came within the common law rule. The present case is distinguishable. The appellant did construct the tower block in which the respondent's unit was located. But it did not complete the construction within the specified time. It delayed the actual delivery.

[34] The other case relied on is *Chye Fook v. Teh Teng Seng Realty Sdn Bhd* [1988] 1 LNS 213. There, the purchaser had entered into an agreement dated 8 August 1984 with the developer under the terms of which the house was to be completed on 7 August 1986, that is to say, 24 months after the date of the agreement. Time was of the essence of the contract. Also, there was a clause which said that "if the vendor fails to deliver vacant possession of the said building in time the vendor shall pay immediately to the purchaser liquidated damages to be calculated from day to day at the rate of ten per centum (10%) per annum of the purchase price". The building was not completed on the agreed date. The purchaser then wrote to the developer on 19 January 1987 rescinding the agreement because the building had not been delivered within the agreed 24-month period. But the building was finally completed in May 1987 and the certificate of fitness was issued on 9 December 1987. The purchaser successfully brought an action for rescission. When giving judgment, the High Court referred to *Mayson v. Clouet* where Lord Dunedin said this:

> If one party to a contract commits a breach then if that breach is something that goes to the root of the contract, the other party has his option. He may still treat the contract as existing and sue for specific performance; or he may elect to hold the contract as at an end, that is, no longer binding on him - while retaining the right to sue for damages in respect of the breach committed

This is perfectly good law and is the exact position reflected in s. 40 of the Act.

Having cited other authorities, including *Johnson v. Agnew* and *Photo Productions*, the High Court said this in its judgment:

> There was no evidence as to what stage of building progress the building was at the completion date but from the photographs taken in July 1987, only the plaintiffs' house had been built out of a row of terrace houses and also no other houses could be seen in the area. Since, from the photographs, the plaintiffs' house appears to be the only house built in the area, it is possible that the construction could have even begun after the completion date. That, however, is of secondary importance.

> What is relevant here is that the plaintiffs had entered into a sale and purchase agreement with the defendants to buy the house and had expected to move into the house two years later. They certainly would have made the necessary preparations for this event and any change in plans would have caused them a great deal of inconvenience and expense. Therefore, if the house was not completed on the appointed date and in fact had not been completed even five months thereafter when the notice to terminate was sent to the defendants and was only completed nine months later and the certificate of fitness issued 16 months after the appointed date, the court is of the view that it is within the right of the purchaser plaintiffs to rescind the contract with the defendants based on legal principles and case law.

[35] In my respectful view the High Court in *Chye Fook v. Teh Teng Seng Realty Sdn Bhd* fell into error in equating the right to terminate for a fundamental breach of contract ie, a breach going to the root of the contract on the one hand with the equitable remedy of rescission on the other. But the decision may nevertheless be supported on its peculiar facts because as may be seen from the judgment, that was a case in which, at the material time the building had not even been constructed. So, as at the date on which the purchaser was to have the house, construction had not even commenced. The actual decision on its facts is therefore supportable as at the material time, the developer had not done any of the things it had promised to do within the time specified by the contract. But in the present case the facts are very different. Here, the construction had commenced and was well on its way. There was a delay in the delivery of vacant possession and for that breach the contract itself provides a remedy - the payment of liquidated damages calculated on the agreed formula. Put simply, this is not a case where there has been a total failure of consideration.

[36] The last authority relied upon by the respondent is *Law Ngei Ung v. Tamansuri Sdn Bhd* [1989] 2 CLJ 181; [1989] 2 CLJ (Rep) 44 where rescission was granted by the High Court for failure on the part of the defendant to complete the business complex in which the plaintiff had purchased a unit shop lot. That case, however, is supportable on the ground that there had been an abandonment of the entire project because of a dispute between the defendant and its contractor. It is a plain and obvious case of a total failure of consideration. Had the High Court stopped with directing a *restitutio in integrum*, there can be no complaint. It however went on to direct the assessment of damages. That on

A the authorities is clearly unsupportable. The plaintiff in a case of total failure of consideration may have a refund of the monies he or she may have paid the defendant. In the alternative, he or she may claim damages. But what the plaintiff cannot do is to have both rescission and damages. For, that results in the plaintiff being
B unjustly enriched.

[37] The appellant argues that the time clause must be read together with the rest of the agreement, in particular the liquidated damages clause, to determine as a matter of interpretation
C whether time was indeed of the essence in respect of the obligation to deliver up the respondent's parcel to it within the stipulated period. It is convenient at this stage to reproduce the relevant clause in full. It is cl. 22 and this is what it says:

> (1) The Premises shall be completed by the Developer and
D vacant possession of the Premises shall be handed over to the Purchaser within thirty-six (36) calendar months from the date of this Agreement ('36 Month Period') PROVIDED ALWAYS that the Purchaser shall irrevocably grant to the Developer an extension of three (3) months from the expiry
E of the 36 Month Period ('Extended Period') in the event that vacant possession of the Premises is not handed over to the Purchaser within the 36 Month Period.
>
> (2) If the Developer fails to hand over vacant possession of the Premises within the Extended Period, the Developer shall
F pay immediately to the Purchaser liquidated damages to be calculated from day to day at the rate of twelve per centum (12%) per annum of the Purchase Price from the date of the expiry of the Extended Period up to the day of delivery of vacant possession of the Premises.
>
> G (3) For the avoidance of doubt, the Purchaser hereby agrees that no claim shall be maintained or instituted against the Developer for any damages, loss, interest, costs and expenses in the event the Developer hands over vacant possession of the Premises after the 36 Month Period but
H within the Extended Period.

[38] It is the appellant's case that the promise to pay liquidated damages renders time to be no longer of essence for the purposes of s. 56(1) of the Act. This is not a case, the appellant submits,
I where there has been an abandonment of the project. On the contrary the project here has been completed, albeit beyond the stipulated time limit. Accordingly, the respondent is not entitled to rescind the agreement at common law: nor is it entitled to lawfully

repudiate it for breach by the appellant. Before considering these submissions, it is necessary as a first step in the process of interpretation to ascertain the meaning and effect of cl. 22(2) - the liquidated damages clause.

[39] In *Loh Wai Lian v. SEA Housing Corporation Sdn Bhd*, the Board of the Privy Council had occasion to interpret a not dissimilar clause in a statutorily regulated contract. This is what Lord Oliver of Aylmerton said when delivering the judgment of the Board:

> It is, in their Lordships' view, tolerably clear that the only rational purpose of defining a payment to be made by the vendor, by reference to what has become a conventional term, as 'agreed liquidated damages' was to make it clear that the purchaser was not to have any right to any other payment by way of damages in respect of the delay over and above what the vendor was undertaking to pay, for there could not sensibly be any prospect of a sum calculated according to mandatory statutory provisions being held to be irrecoverable as a penalty.

Applying Lord Oliver's reasoning by analogy, it is my judgment that cl. 22(2) on its true interpretation makes it clear that so far as monetary compensation is concerned, all that the respondent was entitled to in the event of a delay was the "liquidated damages" calculated in accordance with the terms of that clause. It was certainly not entitled to any additional sum by way of damages at large. The further question to be asked is if cl. 22(2) has any impact on cl. 32 which declares that time shall be of the essence of the contract.

[40] The appellant relies on *Hind Construction Contractors v. State of Maharashtra* AIR [1979] SC 720 in support of its case. There, the appellant/plaintiff was employed to undertake the construction of an aqueduct. Construction had to be completed within twelve months. The appellant failed to do so and the respondent/ defendant treated the contract as at an end. The issue was whether time was of the essence of the contract. The court of first instance held that time was not of the essence of the contract. On appeal, the High Court reversed on other grounds not relevant for the present discussion. On further appeal the Supreme Court set aside the judgment of the High Court and restored the finding made at first instance. Tulzapurkar J when delivering the judgment of the court (Chandrachud CJ (India) and AP Sen J concurring) quoted the following passage from the 4th edition of *Halsbury's Laws of England*, Vol. 4, para. 1179:

> The expression time is of the essence means that a breach of the condition as to the time for performance will entitle the innocent party to consider the breach as a repudiation of the contract. Exceptionally, the completion of the work by a specified date may be a condition precedent to the contractor's right to claim payment. The parties may expressly provide that time is of the essence of the contract and where there is power to determine the contract on a failure to complete by the specified date, the stipulation as to time will be fundamental. *Other provisions of the contract may, on the construction of the contract, exclude an inference that the completion of the works by a particular date is fundamental, time is not of the essence where a sum is payable for each week that the work remains incomplete after the date fixed, nor where the parties contemplate a postponement of completion.*
>
> *Where time has not been made of the essence of the contract or, by reason of waiver, the time fixed has ceased to be applicable, the employer may by notice fix a reasonable time for the completion of the work and dismiss the contractor on a failure to complete by the date so fixed.* (The emphasis is that of Tulzapurkar J)

The learned judge then proceeded:

> It will be clear from the aforesaid statement of law that even where the parties have expressly provided that time is of the essence of the contract such a stipulation will have to be read along with other provisions of the contract and such other provisions may, on construction of the contract, exclude the inference that the completion of the work by a particular date was intended to be fundamental; for instance, if the contract were to include clauses providing for extension of time in certain contingencies or for payment of fine or penalty for every day or week the work undertaken remains unfinished on the expiry of the time provided in the contract such clauses would be construed as rendering ineffective the express provision relating to the time being of the essence of contract. The emphasised portion of the aforesaid statement of law is based on *Lamprell v. Billericay Union*, [1849] 3 Exch 283 at p. 308; *Webb v. Hughes*, [1870] 10 Eq 281 and *Charles Rickards Ltd. v. Oppenheim*, [1950] 1 KB 616. It is in light of the aforesaid position in law that we will have to consider the several clauses of the contract Ex. 34 in the case.

[41] I respectfully accept that the foregoing passages are an accurate statement of the law governing s. 56(1) of the Act. In my judgment, while individual contracts will fall to be interpreted in accordance with their own terms, it is a useful guide to construction that a stipulation as to time must be read along with other provisions of the contract to determine if time is truly of the

essence of the contract. Further, a clause providing for the payment of a sum whether as a fine, a penalty or as liquidated damages calculated on a daily basis for the period that the work undertaken remains unfinished on the expiry of the time provided in the contract would, in the absence of a contrary intention to be gathered from the contract, point to time not being of the essence.

[42] Here it is important to bear in mind that a contract is to be interpreted in accordance with the following guidelines. First, a court interpreting a private contract is not confined to the four corners of the document. It is entitled to look at the factual matrix forming the background to the transaction. Second, the factual matrix which forms the background to the transaction includes all material that was reasonably available to the parties. Third, the interpreting court must disregard any part of the background that is declaratory of subjective intent only. Lastly, the court should adopt an objective approach when interpreting a private contract. See, *Investors Compensation Scheme Ltd v. West Bromwich Building Society* [1998] 1 All ER 98. As Lord Clyde said in *Bank of Credit and Commerce International SA v. Munawar Ali* [2001] 2 WLR 735:

> The knowledge reasonably available to them (that is to say the parties to the contract) must include matters of law as well as matters of fact. The problem is not resolved by asking the parties what they thought they intended. It is the imputed intention of the parties that the court is concerned to ascertain. The parties may well have never applied their minds to the particular eventuality which has subsequently arisen, so that they may never in fact have had any conscious intention in relation to that eventuality. It is an objective approach which is required and a solution should be found which is both reasonable and realistic. The meaning of the agreement is to be discovered from the words which they have used read in the context of the circumstances in which they made the agreement. The exercise is not one where there are strict rules, but one where the solution is to be found by considering the language used by the parties against the background of the surrounding circumstances.

[43] In *Nouvau Mont Dor (M) Sdn Bhd v. Faber Development Sdn Bhd* [1985] 1 CLJ 56; [1985] CLJ (Rep) 231, Seah FJ expressed the view that:

> ... whether or not an assignment is an absolute one (not purporting to be by way of charge only) within the meaning of section 4(3) of the Civil Law Act 1956 is to be gathered only from the four corners of the instrument itself.

This view is not consistent with the speech of Lord Wilberforce in the earlier case of *Prenn v. Simmonds* [1971] 3 All ER 237, 241 (applied by the former Federal Court in *Keng Huat Film Co Sdn Bhd v. Makhanlall (Properties) Pte Ltd* [1983] 2 CLJ 187; [1983] CLJ (Rep) 186 FC) and later learning to be found in the decisions of the House of Lords in *Investors Compensation Scheme Ltd v. West Bromwich Building Society* and *Bank of Credit and Commerce International SA v. Munawar Ali*. The most recent statement of the guideline to interpretation of contracts statutes and other instruments is to be found in *Attorney General of Belize v. Belize Telecom Limited* [2009] UKPC 11, where when delivering the Advice of the Board, Lord Hoffmann said:

> The court has no power to improve upon the instrument which it is called upon to construe, whether it be a contract, a statute or articles of association. It cannot introduce terms to make it fairer or more reasonable. It is concerned only to discover what the instrument means. However, that meaning is not necessarily or always what the authors or parties to the document would have intended. It is the meaning which the instrument would convey to a reasonable person having all the background knowledge which would reasonably be available to the audience to whom the instrument is addressed: see *Investors Compensation Scheme Ltd v. West Bromwich Building Society* [1998] 1 WLR 896, 912-913. It is this objective meaning which is conventionally called the intention of the parties, or the intention of Parliament, or the intention of whatever person or body was or is deemed to have been the author of the instrument.

It follows from these authorities that the view of Seah FJ in *Nouvau Mont Dor (M) Sdn Bhd v. Faber Development Sdn Bhd* quoted above is not good law and should not be followed.

[44] Returning to the mainstream, we have here an agreement which contains two clauses. One that provides for the payment of a sum as liquidated damages calculated on a daily basis for the period of delay in making delivery of the premises in question and another that makes time of the essence of the contract. Applying the guidelines discussed earlier, it is my judgment that time is not of the essence of the agreement in this case. A promise to construct and deliver a building within a stipulated time coupled with a promise to compensate for any delay in delivery is inconsistent with a right to terminate on the ground that time is of the essence. It certainly points to an intention that time was not to be of the essence.

[45] There is alternative ground for holding that time is not of the essence. It is this. The respondent, though it had the right to put an end to the contract when the appellant failed to deliver the unit within the stipulated time, did not do so. Instead, it continued making payments and negotiating for delivery. The respondent's conduct certainly points to the conclusion that even if time was of the essence when the contract was made (speaking advisedly) it ceased to be of the essence. There are many authorities on the subject. But I find it sufficient to merely refer to the judgment of Raja Azlan Shah J (as His Royal Highness then was) in *Wong Kup Sing v. Jeram Rubber Estates Ltd* [1969] 1 LNS 201 where he said:

> Once the time for completion was allowed to pass and the parties went on negotiating, then time was no longer of the essence of the contract and the defendants must give a reasonable notice of their intention to abandon the contract if the balance of the purchase money was not paid: (*Webb v. Hughes* [1870] LR 10 Eq 281, 286, *Stickney v. Keeble* [1915] AC 386, 423). If the defendants had on the very day of 30th November 1966 ie, the original date for completion, made their stand, their decision would have been that time was of the essence and it would have been proper for them to give notice on the day fixed for completion that they would abandon the contract; but after going on negotiating they should have given a reasonable notice: (*Tilley v. Thomas* LR 3 Ch D 61).

However, I am content to decide this appeal on the former ground, that is to say, that when the agreement in this case is properly construed in accordance with the relevant guidelines, time was not of the essence *ab initio*.

[46] To summarise, this is a case in which, upon a proper construction of the agreement, time was not of the essence. The respondent was not therefore entitled to terminate or put an end to the contract when the appellant failed to deliver the unit of shop lot on the stipulated date. All that it was entitled to receive was compensation calculated on the agreed basis. Its purported termination of the agreement was therefore wrongful.

[47] It follows from what I have said thus far that the courts below were wrong in finding for the respondent. I would accordingly allow this appeal and set aside the orders of the High Court and the Court of Appeal. The respondent's action is dismissed. Costs at all levels are awarded to the appellant. The deposit in court shall be refunded to it.

[48] My learned brother Mohd Ghazali bin Mohd Yusoff, FCJ has seen this judgment in draft and has expressed his agreement with it.